Adult Guardianship and the COVID-19 Pandemic: Lessons Learned



INTRODUCTION

The COVID-19 pandemic sent ripples of change throughout the world of adult guardianship. Remote court hearings, facility lock-downs, soaring infection rates, and unexpected deaths drove changes for all guardianship stakeholders, with urgent questions such as:

- What is or should be an emergency guardianship in the post-pandemic new normal?
- Can a guardian ad litem or court visitor fulfill the role virtually?
- To what extent have guardianship court proceedings been conducted remotely and what are the costs and benefits of continuing these remote practices?
- Can the court accept virtual capacity assessments? What safeguards are needed?
- Is a virtual visit by the guardian an "in-person" visit? Does meeting with the adult remotely affect the nature of decision-making?
- Should guardians have plans for a back-up in case they become ill or die?
- Should guardians focus additional attention on their duties following death of the adult?

The pandemic hit hard the populations subject to – or potentially subject to – guardianship. According to the Centers for Disease Control and Prevention, older adults and those with underlying chronic conditions have been far more likely than others to be hospitalized and to die from COVID-19, with adults age 65+ experiencing eight out of ten COVID-19 deaths reported in the U.S. (CDC Older Adults; CDC Medical Conditions, 2021). Residents in congregate settings such as nursing homes, assisted living, and group homes were highly exposed. CDC reports that about 8% of residents of long-term-care facilities have died of COVID-19 – nearly one in 12. For nursing homes alone, the figure is nearly one in 10 (CDC Long-Term-Care COVID Tracker, 2021). As of June 1, 2021, there were at least 184,000 deaths (31% of all U.S. deaths from COVID) in long-term care facilities (New York Times 2021).

Moreover, people with dementia have been more likely than others to get COVID, to need hospitalization, and to die from the illness [Wang et al, 2021]. CDC warned that people with limited mobility or who must be in close contact with others, people with difficulty understanding information or taking preventive measures, and people who cannot clearly communicate symptoms have been at increased risk (CDC Disabilities, 2021).

The pandemic left a lasting impact on adult guardianship law, policy and practice – including important adaptations that ultimately could make the system operate more fairly and effectively. In some aspects, the COVID crisis was a creative opportunity for future change. What did we learn? What "resets" are needed in quardianship practice?

One of the biggest lessons learned was about social isolation. The pandemic taught us that connections to family, friends, and the community are essential to health and well-being [Consumer Voice, 2021]. Research shows potentially serious mental health and physical health consequences of loneliness and social isolation (Hwang et al, 2020; Holt-Lunstad, 2020).

The take-away for guardianship is the need for a heightened priority on social connections. Maintaining and building social networks may directly affect financial, residential, and other personal decisions. Court orders, guardian plans, and guardian reports should all reflect this new-found emphasis on social connections as a critical determinant of health.

The pandemic also taught other lessons, as described below. First, because nothing is certain and illness can intervene at any time, it recharged the urgency of using legal tools for advance planning to avoid guardianship if possible. Second, it forced changes in court procedures with both possible pros and cons. Finally, it highlighted guardian practices to better confront crises such as COVID-19 outbreaks.



Spotlight on Advance Planning

Because guardianship can drastically remove an individual's rights, it should always be a last resort. Less restrictive options enhance personal choice and control. The best alternatives to guardianship are those put in place by an individual who is planning in advance for the possibility that they may someday need help with personal or financial decision-making. COVID-19 made it clear that everyone is vulnerable to unexpected severe illness and death. Many COVID patients became incapacitated and unable to make decisions about healthcare and other personal and financial issues, for days, weeks or months. While many adults still don't engage in advance planning (Federal Reserve Board, 2013), the pandemic should be a wake-up call to consider planning tools such as the following:

• Health care advance directives: These documents explain how a person wants medical decisions made if they are too ill or otherwise unable to make them. A health care proxy (also known as a health care power of attorney), one type of advance directive, names someone to make health care decisions if the person cannot. A living will explains what treatment a person does or doesn't want if their life is threatened, including treatments like resuscitation, dialysis, feeding or breathing tubes, and ventilators.

- Power of attorney: This legal document allows someone else to manage money and property on a person's behalf. It is a tool for planning for future incapacity because a trusted person (the agent) can stand in for an individual (the principal) who can no longer make or communicate financial decisions. Generally, powers of attorney remain effective after the person loses the ability to make financial decisions. Powers of attorney list the actions that the agent can take, according to the needs of the individual.
- **Living trust:** This is a legal document used by an individual to give someone else legal authority to make decisions about money or property in a trust. In order for a trust to take effect, the individual must put money or property in the name of the trust. The trustee then manages the money or property in the trust if the individual who set up the trust cannot. The trust also says who gets the money or property after the person who created it dies.
- **Supported decision-making agreement.** The more support an adult has with decision-making, the less likely a guardian will be needed. An adult and a trusted supporter may have a written agreement in which the adult makes their own decisions with the supporter's help in: getting needed information; considering options; understanding risks; and communicating their decisions to others (Dinerstein, 2012). A growing number of state laws provide for recognition of supported decision-making agreements (Pogach, 2020).

In addition, there are ways to influence who a government agency might appoint as decision-maker for benefits if the need arises. For example, people can designate someone in advance to become their Social Security Representative Payee, in case the agency determines in the future that they cannot manage their own benefits (Social Security Administration, 2021).



Changes in Role of the Court

As the pandemic caused shutdowns in almost every aspect of daily life—workplaces, government institutions, schools, retail establishments, medical offices, transportation—courts began to face daunting questions on how to continue their vital role in the face of the public health disaster. State governors issued broad executive orders impacting how the courts would function [Council of State Governments, 2021] and state supreme courts likewise issued orders [National Center for State Courts, 2021], but judges and court administrators had to determine how to handle both initial petitions for guardianship and the ongoing monitoring and decision—making needed for these cases. Examining the challenges courts faced provides an opportunity to strengthen quardianship systems and practices moving forward.

Remote Hearings

With the onset of the pandemic, most state court systems severely limited the types and numbers of proceedings held in person, and even the number of matters heard remotely by necessity decreased substantially. Many guardianship petitions were put on hold and courts held remote hearings in cases that were deemed essential.

Reports from judges, court administrators and others indicated that their courts heard petitions for temporary or emergency guardianship remotely (National Center for State Courts, 2020). Not surprisingly, many of the circumstances giving rise to these petitions were healthcare-related. Hospitals filed petitions for guardianship to remove life support, discharge patients to make beds available for acutely sick patients, and place hospital patients in nursing facilities. Judges and court personnel needed training on using videoconferencing, protocols to enable the public to observe proceedings, and processes for receiving and sharing exhibits.

As the public health emergency subsides, in-person hearings will undoubtedly resume to a substantial extent. But the courts' experience with remote hearings will likely encourage more widespread remote participation in guardianship cases and have other advantages, as long as there are appropriate safeguards. Probate judges reported that:

- Respondents, including those in nursing facilities, have been able to participate on-screen in videoconference hearings, perhaps in greater numbers than had previously participated in in-person hearings
- Technology problems and delays were minimal, once systems were put in place
- Videoconferencing encouraged some efficiencies, such as submitting and sharing exhibits in advance, which saved time during the hearings
- Remote hearings reduced potential exposure to COVID and other transmissible diseases
- Appointment of counsel in all cases where respondents have not already retained their own attorneys was crucial to ensure that remote hearings are fair and to maximize respondents' participation in hearings (National Center for State Courts, 2020).

Challenges remain. Courts will need to be sensitive to the possibility that third parties in the presence of an individual influence testimony or demeanor without the awareness of the court. Determining the credibility of witnesses by videoconference is harder than in person. But as in so much of post-pandemic life, courts are likely to have hybrid processes. Data collection and evaluation of these new procedures will be crucial to integrate remote processes in ways that are fair and enhance procedural rights.

Changes in the Role of Guardian ad Litem and Court Visitor

Many courts with jurisdiction to hear and oversee guardianship cases rely on individuals to be their "eyes and ears" regarding the general well-being of people subject to or potentially subject to guardianship. A guardian ad litem (GAL) is a person – generally an attorney – appointed by the court to make an impartial inquiry, often in the initial adjudication phase of the case but sometimes at a later point after a guardian has been appointed. A court visitor, also called a monitor or investigator, is someone – often with social work or similar skills – appointed to provide the court with information about a person or guardian.

Typically, a GAL or a court visitor will visit the individual and the proposed guardian in person before a guardianship hearing, but they also may visit after the guardian is appointed, to check on the individual's welfare. During the pandemic, these live visits became impossible for long periods of time, especially when the individual resided in a nursing facility or other congregate setting. Court visitors reported that "window visits" were insufficient and that virtual visits, even when logistically possible, were less than ideal (National Center for State Courts, 2020). They became more reliant on tangential information, which might undermine the weight of their reports to the court.

As congregate facilities become better at supplying residents with needed technology and assistance, GALs and court visitors may have an easier time performing thorough and sensitive investigations when in-person visits are impossible. While it is essential that GALs and court visitors resume in-person visits, the pandemic taught us that videoconferencing can go a long way to bridge distance and reach isolated individuals when visits are unsafe. GALs and court visitors should continue to use technology to supplement in-person visitation. They should implement strategies to supply individuals with the necessary devices and assistance to make technology viable.

Remote Capacity Assessments

Before a guardian can be appointed, the petitioner must present evidence that the individual lacks capacity to make personal and/or financial decisions. A functional assessment by a qualified professional is an important step in providing the court with the information it needs to make a determination on capacity (National Guardianship Association, 2017). The court may order an evaluation prior to the hearing. Capacity assessments can also be critical for the court in determining whether to restore an individual's rights by limiting or ending a guardianship.

The pandemic has shown us that public health emergencies can disrupt access to medical and psychological assessment and treatment. Service delivery rapidly shifted to telehealth, and while telehealth has been surprisingly robust, it isn't yet clear that telemedicine can fill all of the gaps – especially for older people and people with disabilities who may lack connectivity, technology and are able to access services remotely.

There's some evidence that clinicians can successfully conduct cognitive testing and other elements of capacity assessments remotely. A geriatric team in Texas began partnering with Adult Protective Services (APS) to conduct remote capacity assessments before the onset of the pandemic. In a large state with massive rural areas, videoconferencing enabled APS and its clinical partners to reach older adults subject to mistreatment and self-neglect, and ascertain whether they had the capacity to consent to or refuse services as well as whether guardianship might be appropriate (Halphen et al., 2020). Attending physicians at congregate living facilities also have utilized platforms such as Zoom to remotely evaluate the cognitive health of residents (Syre, 2020). These models do tend to require some personal assistance at the patient's location. For example, in the Texas model, APS staff are on-site with the individual to assess things like the condition of the residence, hygiene of the individual and other things that can't be observed remotely.

Courts and clinicians may never go back to all in-person services. Undoubtedly courts will more often rely on capacity assessments that have been conducted using videoconferencing and other remote techniques. Researchers should investigate the efficacy and reliability of remote capacity assessments, focusing on issues such as:

- whether clinicians can sufficiently observe the patient's demeanor, communication skills, and affect;
- whether others who may be in the presence of the patient might exert influence that distorts findings; and
- whether the evaluator can adequately assess the patient's environment.

Clinicians and court staff should develop practical guidance for attorneys, family members, professionals conducting evaluations and others to enable remote adults to access technology and to enhance the reliability of remote assessments. This guidance should emphasize the importance of using options less restrictive than guardianship and providing decision supports.

Emergency Guardianships

Emergency guardianships are intended for situations in which there would be irreparable harm to a person's health or estate if a guardian is not appointed immediately. Generally, courts hold hearings within a few days of the filing of the emergency petition, and many of the mandated due process procedures are waived due to the need for urgent action. State laws typically provide that emergency appointments are for a limited number of days with limited extensions. If there is a need for the guardianship to continue, courts must ensure that individuals receive the full due process protections articulated in the statute and a full hearing.

While data are lacking, anecdotal evidence suggests that courts saw an uptick in emergency guardianship petitions during the COVID-19 pandemic. This could have been because many courts were only hearing cases involving emergency petitions (so a petition would have to be framed as an emergency to receive action) and because COVID-related health crises required immediate decisions about treatment and placement.

The pandemic's focus on emergency guardianship provides an opportunity to address the threat that emergency guardianship petitions and appointments can pose. Due process protections such as notice to the subject of the petition and family members, and the ability to be represented by an attorney, are vital because guardianship removes such basic human rights. A temporary emergency appointment can result in the imposition or withdrawal of life-sustaining treatment and placement in a nursing home or other institutional setting. The person subject to the petition might not actually be incapacitated, and the person appointed to serve as guardian, even temporarily, might not be the best choice. The emergency guardianship process is often triggered by situations that aren't true emergencies, such as delinquent nursing home bills. Experience has shown that once an emergency petition is granted, a more permanent order is more likely to follow (Hirschel and Smetanka, 2021).

Now is a good time to take steps—involving education, legal and judicial practice, and legislation if necessary—to ensure that emergency guardianships are only granted in true emergencies, that their duration is brief, that the guardian's powers are tailored to the specific emergency, and that due process is granted as quickly as possible after the order.



Changes in Role of the Guardian

The guardian's duties and powers are set out in state code, state case law, the National Guardianship Association *Standards of Practices* (NGA, 2017), and any state guardianship standards. The pandemic spotlighted the need for some key shifts in focus in the guardian's role. Many of these changes are simply good practices that should extend beyond COVID.

Maintain the Adult's Family and Social Connections

With facility lock-downs, quarantines, and social distancing, guardians have directly witnessed the high costs of social isolation. Guardians have seen adults they were named to protect separated from family and friends – by nursing home and assisted living walls, stay at home orders, and closures of common community meeting places. Society's precautions to avoid infection at the same time caused devastating loneliness, anxiety, and mental health issues for many thousands of older adults and persons with disabilities. Looking ahead, guardians must heighten their efforts to nurture the individual's connections to people and groups important to them.

The NGA Standards of Practice direct guardians to "promote social interactions and meaningful relationships consistent with the preferences of the person under guardianship." Further, the Standards charge guardians to "encourage and support the person in maintaining contact with family and friends, as defined by the person, unless it will substantially harm the person" [Standard #4].

Guardians can support these contacts through a robust mix of in-person and remote visits. While in-person visits generally are preferable for personal connections, virtual visits can supplement between in-person meetings, and can make long-distance visits possible, extending the circle of contacts.

If the adult subject to guardianship has hearing loss, vision loss or dementia, and is unfamiliar with technology, remote communication may be a challenge. Speaking slowly and clearly, using plain language, and covering only one topic at a time may help the adult to be more comfortable with the on-screen image [NGA et al, FAQs, 2020].

Maintain Guardian Contact with the Adult

All guardians have a clear duty to maintain contact with the adult they are named to support, and to be as up-to-date as possible on the adult's condition, needs, values, and preferences. While state laws and standards vary, the NGA *Standards of Practice* require the guardian to visit the adult "no less than monthly" (Standard #13(IV).

During the pandemic, many guardians could not visit in person, but sought to remain connected through remote access technology – using laptops, I-pads, Facetime, video chats, text, and other virtual platforms to learn about the adult's current wishes and needs. These devices also can allow the guardian to visually assess the person's condition, connect with care providers, and participate in residential facility care plan meetings. Having forged these technological paths under crisis, guardians should continue using them – to supplement but not supplant – a guardian's in-person visits. This may require the guardian to secure needed technology and internet access for the adult, and to ensure they have necessary help in using it.

Using technology for guardian communications with the adult has clear benefits but may have downsides as well. First, remote visits may not give the guardian the complete picture of the person's needs and circumstances. Seeing the person physically and in their daily environment can make the guardian more aware of health and mobility problems, as well as needed accommodations in the home. Second, using technology for remote contacts may compromise confidentiality. For instance, a nursing home resident may need staff to help in setting up a remote video meeting. Guardians could ask for some private time to talk with the resident; and could use the remote meetings simply to keep in touch between more confidential in-person meetings.

Monitor Residential Settings

The NGA Standards of Practice require the guardian to "monitor the residential setting on an ongoing basis and take any necessary action" (Standard #13 (IV) G). During the pandemic, it was a challenge for guardians to assess long-term care facility infection prevention and control measures as well as overall provision of care in the face of rising COVID cases.

As facilities began to open up and guardians have been allowed back in, there is a continuing responsibility to observe facility practices, ask questions, and identify any critical care gaps. Maintaining a relationship with the facility director and other staff, as well as the local long-term care ombudsman will help. Having the quardian's eyes on the facility will encourage good care.

Respond to Evolving Medical, Social and Financial Developments

The pandemic has brought about new approaches to delivery of services. Medical professionals increasingly are using telehealth consultations. Care managers and social services providers are more frequently connecting with clients via remote access. Guardians must be alert to these approaches. In what circumstance will telehealth work for the adult subject to guardianship, given the adult's condition? Is the adult at a disadvantage in lacking broadband access or computer technology? Does the adult need assistance in linking with providers? Might the adult be subject to frauds or scams in accepting services virtually?

The pandemic also has brought economic tumult and devastation to many. In the midst of soaring evictions, CDC instituted an eviction moratorium, and many states bolstered eviction safeguards. Both federal and state enactments and funding sought to provide wrap-around eviction services and protections. [O'Connell, 2021; Consumer Financial Protection Bureau, 2021]. Guardians must be vigilant as to whether the adult is at risk of eviction, and what resources are available.

Finally, in response to the pandemic, the federal government provided Economic Impact Payments (or "stimulus checks") and made other benefits and short-term debt relief available to many in need (NGA et al, Frequently Asked Questions, 2020). Guardians have an obligation to take steps to ensure any such benefits reach those adults subject to guardianship that are eligible to receive them. The NGA *Standards of Practice* require the guardian to "obtain all public and insurance benefits for which the person is eligible" (Standard #18(V).

Identify Back-Up Guardian

Guardians too have been at risk of contracting COVID-19, and the pandemic highlighted the need for guardians to have a back-up plan for who will assume responsibilities if the guardian becomes unable to do so.

A model act, the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, allows for the "Judicial Appointment of a Successor Guardian or Successor Conservator" [Uniform Law Commission, Sec. 111, 2017]. With a successor guardian, someone would be appointed by the court who will step in to take the place of an existing guardian if the existing guardian dies or is unable to serve. A successor guardian has the predecessor's powers unless otherwise provided.

State laws vary. Some states provide for the court's appointment of a "stand-by" guardian to step in when a guardian can no longer serve. For example, Florida law provides for the court to "appoint any standby guardian or preneed guardian, unless the court determines that appointing such person is contrary to the [person's] best interests." The Virginia Code allows a petition by a parent, child or guardian of the adult for the court to appoint a standby guardian or conservator, which must be affirmed biennially with the court. The standby guardian or conservator is then authorized to act upon the death or incapacity of the guardian, subject to confirmation by the court.

If the state does not have a stand-by provision, guardians should be prepared to notify the court promptly so the judge can order a temporary substitute.

Exercise Post-Death Authority

While there is no specific data, we know that many adults with guardians died from COVID-19, often unexpectedly – and that these guardians promptly had to assume post-death duties. The lesson learned is that from the time of appointment, guardians need to understand their post-death authority and duties, and be prepared to act immediately following the death of the adult subject to guardianship.

The NGA Standards of Practice provide that on the death of the adult, the guardian should "facilitate the appropriate closing of the estate and submit a final accounting to the court" [Standard #18(X)]. Specific guardian duties following the death, in closing the estate, include:

- informing family and friends who are entitled to know, and informing the family about any pre-need funeral planning arranged;
- checking state laws and any directive from the person about the disposition of the body and the funeral arrangements;
- notifying the court of the death;
- filing the final personal status report and/or the final accounting;
- petitioning the court to terminate the guardianship; and
- following state law as to disbursing the estate to the personal representative.

State laws differ as to the guardian's role in disposition of the body and funeral arrangements. For example, recent legislation in Indiana included the guardian in the list of persons with the right to serve as an authorizing agent in funeral planning (SB 276). It is always important to contact any family members prior to these arrangements.

State laws also vary as to the guardian's final duties in distributing the estate to any beneficiaries. The Uniform Act requires the conservator to "deliver to the court for safekeeping any will of the individual in the conservator's possession and inform the personal representative named in the will if feasible, or if not feasible, a beneficiary named in the will, of the delivery" [Uniform Act Sec. 427]. If after 40 days from the date of death no one has been appointed as personal representative, and no application has been filed with the court, the conservator may apply to exercise the powers and duties of a personal representative and to administer and distribute the estate.

Many states track these Uniform Act provisions, requiring the conservator to deliver the will to the court for safekeeping, and allowing the conservator to administer the distribution if no one else comes forward in a given period. Some states have no such provision, and guardians or conservators should seek quidance from the court.

CONCLUSION

Tragic as it was, the pandemic drove changes in adult guardianship policy and practice that have the potential for improvements for courts, stakeholders and for the lives of vulnerable individuals. Now is the time to evaluate those changes carefully, refine them with any needed safeguards, and incorporate them toward a more just, fair and person-centered process.

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